



NATIONAL ARCHIVES

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Karen V. Gregory
Secretary
Federal Maritime Commission
800 North Capitol Street NW
Washington, DC 20573-0001
secretary@fmc.gov

Submitted via e-mail to secretary@fmc.gov per instructions in the Federal Register notice, Vol. 80, No. 127/Thursday, July 2, 2015/Rules and Regulations

RE: The Federal Maritime Commission Amendments to Regulations Governing Access to Commission Information and Records; Freedom of Information Act, 46 C.F.R. Part 503, RIN 3072-AC60, Docket No. 15-05

We offer these comments on behalf of the National Archives and Records Administration's Office of Government Information Services (OGIS). OGIS has the statutory mandate under the Freedom of Information Act (FOIA) to offer mediation services to resolve disputes between FOIA requesters and agencies, and to review agency FOIA policies, procedures, and compliance (5 U.S.C. §§ 552(h)(1)-(3)). As part of our review mission, we comment on proposed new and updated agency FOIA regulations.

While we are aware that FMC is proposing to amend only a portion of its FOIA regulation, we reviewed the entire regulation and offer the following comments.

OGIS commends the Federal Maritime Commission for updating its FOIA regulation to clarify what records the public can access without a FOIA request and to reflect changes to practices under the OPEN Government Act of 2007, which created OGIS.

§ 503.31 Records available upon written request under the Freedom of Information Act:

Regarding subsection (a)(1), although it may be helpful to agency personnel to require requesters to indicate that their requests are being made under FOIA, either on the outside of an envelope or in the subject line of an email, 5 U.S.C. § 552 does not require it. We recommend that you change the wording to say requesters "should" mark a request as a "FOIA" request.

NATIONAL ARCHIVES *and*
RECORDS ADMINISTRATION

8601 ADELPHI ROAD
COLLEGE PARK, MD 20740-6001
www.archives.gov

§ 503.32 Procedures for responding to requests made under the Freedom of Information

Act: Regarding Subsection (a)(2), we suggest providing a brief description of the information the Department or component is withholding if it is possible without revealing exempt information.

Regarding Subsection (a)(3)(i)(B) and the 10-business-day appeals window, we recommend that the Commission extend its deadline to submit appeals. Allowing requesters 10 days to appeal is outside of general agency practices. Agencies generally allow requesters to file appeals within 30 to 60 days, with some agencies providing up to 90 days to file an appeal.

Regarding Subsection (a)(3)(i)(B)(iii), we suggest that the Commission, in its final appeal determinations, alert FOIA requesters to OGIS's services, as recommended by the Department of Justice's Office of Information Policy (<http://www.justice.gov/oip/foiapist/2010foiapist21.htm>).

Specifically, we suggest the following language:

We will also advise the requester that the Office of Government Information Services (OGIS) provides mediation services to requesters to help resolve FOIA disputes they may have with Federal agencies, as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road—OGIS
College Park, MD 20740
ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

§ 503.33 Exceptions to availability of records: Regarding Subsection (a)(3) and Exemption 3 statutes, we suggest that providing information about any Exemption 3 statutes that the Commission routinely uses could help set requester expectations and help shed light on the FOIA process.

Subpart E—Requests for Testimony by Employees Relating to Official Information and Production of Official Records in Litigation (§§ 503.37—503.42) and Subpart F—Fees for services (§§ 503.48—503.50): We suggest changing the order of these two subparts as fees are an important part of the FOIA process and could get lost in the current order.

§ 503.48 Policy and services available: Regarding the Commission's willingness to reduce or waive fees in cases in which "a fee would impose an undue hardship," we note that there is no such statutory requirement.

§ 503.50 Fees for services: Regarding subsection (a), we suggest that the agency consider adding several terms, including requester category and fee waiver, to the definitions. We have observed confusion by both requesters and agencies regarding these terms.

Requester category means one of the three categories that agencies place requesters in for the purpose of determining whether the agency will charge the requester fees for search, review, and duplication. The three requester categories are commercial requesters, non-commercial scientific or educational institutions or news media requesters, and all other requesters.

Fee waiver means that we may waive or reduce processing fees if a requester can demonstrate that they have satisfied certain statutory standards, including that the information is in the public interest and is not requested for a commercial interest.

Regarding Subsection (a)(3), the definition of review, and the reference to commercial use requests, the statute requires agencies to review *all* records processed under FOIA regardless of the category the agency places the request in for the purposes of determining fees. While *all* records processed under FOIA must be reviewed, only commercial use requesters pay review fees.

Regarding Subsection (a)(7), we suggest updating the definition of a representative of the news media to reflect changes in the OPEN Government Act of 2007. The statute defines a representative of the news media as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(ii).

Regarding Subsection (b)(2)(x)(B), we suggest that agencies provide requesters with an estimated amount of fees, including a breakdown of the fees for search, review, and/or duplication. This is an OGIS best practice.

Comments submitted on behalf of the National Archives by:

Office of Government Information Services

National Archives and Records Administration

8601 Adelphi Road—OGIS

College Park, MD 20740

ogis.archives.gov

E-mail: ogis@nara.gov

Telephone: 202-741-5770

Toll-free: 1-877-684-6448

Facsimile: 202-741-5769